

# SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

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Prepared By: Governmental Oversight and Productivity Committee

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BILL: SB 2462

INTRODUCER: Senator Posey

SUBJECT: Public Records Exemption; Legislative Sunset Advisory Committee

DATE: April 14, 2006

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Rhea	Wilson	GO	<b>Pre-meeting</b>
2.	_____	_____	GA	_____
3.	_____	_____	WM	_____
4.	_____	_____	RC	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

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## I. Summary:

This bill creates an exemption from public records requirements for working papers prepared or maintained by the Legislative Sunset Advisory Committee in performing its duties under ch. 21, F.S.

As this bill creates a public records exemption, it requires passage by two-thirds of the members present and voting in both Houses.

This bill creates s. 21.0195 of the Florida Statutes.

## II. Present Situation:

**Public Records** – Florida has a long history of providing public access to government records. The Legislature enacted the first public records law in 1892.<sup>1</sup> The Florida Supreme Court has noted that ch. 119, F.S., the Public Records Act, was enacted

... to promote public awareness and knowledge of government actions in order to ensure that governmental officials and agencies remain accountable to the people.<sup>2</sup>

In 1992, Floridians adopted an amendment to the State Constitution that raised the statutory right of access to public records to a constitutional level.<sup>3</sup> Article I, s. 24 of the State Constitution, provides that:

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<sup>1</sup> Sections 1390, 1391, F.S. (Rev. 1892).

<sup>2</sup> *Forsberg v. Housing Authority of the City of Miami Beach*, 455 So.2d 373, 378 (Fla. 1984).

<sup>3</sup> Article I, s. 24 of the State Constitution.

(a) Every person<sup>4</sup> has the right to inspect or copy any public record made or received in connection with the official business of any public body, officer, or employee of the state, or persons acting on their behalf, except with respect to records exempted pursuant to this section or specifically made confidential by this Constitution. . . .

Unless specifically exempted, all agency<sup>5</sup> records are available for public inspection. The term “public record” is broadly defined to mean:

All documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, data processing software, or other material, regardless of the physical form, characteristics, or means of transmission, made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency.<sup>6</sup>

The Florida Supreme Court has interpreted this definition to encompass all materials made or received by an agency in connection with official business, which are used to perpetuate, communicate or formalize knowledge.<sup>7</sup> All such materials, regardless of whether they are in final form, are open for public inspection unless made exempt.<sup>8</sup>

Only the Legislature is authorized to create exemptions to open government requirements.<sup>9</sup> Exemptions must be created by general law and such law must specifically state the public necessity justifying the exemption. Further, the exemption must be no broader than necessary to accomplish the stated purpose of the law.<sup>10</sup> A bill enacting an exemption<sup>11</sup> may not contain other substantive provisions, although it may contain multiple exemptions that relate to one subject.<sup>12</sup> A bill creating an exemption must be passed by a two-thirds vote of both houses.<sup>13</sup>

The Public Records Act<sup>14</sup> specifies conditions under which public access must be provided to records of the executive branch and other agencies. Section 119.07(1) (a), F.S., states:

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<sup>4</sup> Section 1.01(3), F.S., defines “person” to include individuals, children, firms, associations, joint adventures, partnerships, estates, trusts, business trusts, syndicates, fiduciaries, corporations, and all other groups or combinations.

<sup>5</sup> The word “agency” is defined in s. 119.011(2), F.S., to mean “. . . any state, county, district, authority, or municipal officer, department, division, board, bureau, commission, or other separate unit of government created or established by law including, for the purposes of this chapter, the Commission on Ethics, the Public Service Commission, and the Office of Public Counsel, and any other public or private agency, person, partnership, corporation, or business entity acting on behalf of any public agency.”

<sup>6</sup> Section 119.011(11), F.S.

<sup>7</sup> *Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc.*, 379 So.2d 633, 640 (Fla. 1980).

<sup>8</sup> *Wait v. Florida Power & Light Company*, 372 So.2d 420 (Fla. 1979).

<sup>9</sup> Article I, s. 24(c) of the State Constitution.

<sup>10</sup> *Memorial Hospital-West Volusia v. News-Journal Corporation*, 729 So.2d 373, 380 (Fla. 1999); *Halifax Hospital Medical Center v. News-Journal Corporation*, 724 So.2d 567 (Fla. 1999).

<sup>11</sup> Under s. 119.15, F.S., an existing exemption may be considered a new exemption if the exemption is expanded to cover additional records.

<sup>12</sup> Art. I, s. 24(c) of the State Constitution.

<sup>13</sup> *Ibid.*

<sup>14</sup> Chapter 119, F.S.

Every person who has custody of a public record shall permit the record to be inspected and examined by any person desiring to do so, at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public record.

If a record has been made exempt, the agency must redact the exempt portions of the record prior to releasing the remainder of the record.<sup>15</sup> The records custodian must state the basis for the exemption, in writing if requested.<sup>16</sup>

There is a difference between records that the Legislature has made exempt from public inspection and those that are *confidential* and exempt.<sup>17</sup> If the Legislature makes a record confidential and exempt, such information may not be released by an agency to anyone other than to the persons or entities designated in the statute.<sup>18</sup> If a record is simply made exempt from disclosure requirements, an agency is not prohibited from disclosing the record in all circumstances.<sup>19</sup>

In *Ragsdale v. State*,<sup>20</sup> the Florida Supreme Court held that the applicability of a particular exemption is determined by the document being withheld, not by the identity of the agency possessing the record. Quoting from *City of Riviera Beach v. Barfield*,<sup>21</sup> a case in which documents were given from one agency to another during an active criminal investigation, the *Ragsdale* court refuted the proposition that inter-agency transfer of a document nullifies the exempt status of a record:

“We conclude that when a criminal justice agency transfers protected information to another criminal justice agency, the information retains its exempt status. We believe that such a conclusion fosters the underlying purpose of section 119.07(3)(d), which is to prevent premature *public* disclosure of criminal investigative information since disclosure could impede an ongoing investigation or allow a suspect to avoid apprehension or escape detection. In determining whether or not to compel disclosure of active criminal investigative or intelligence information, *the primary focus must be on the statutory classification of the information sought rather than upon in whose hands the information rests.* Had the legislature intended the exemption for active criminal investigative information to evaporate upon the sharing of that information with another criminal justice agency, it would have expressly provided so in the statute.” Although the information sought in this case is not information currently being used in an active criminal investigation, the rationale is the same; that is, that the focus in determining whether a document has lost its status as a public record must be on the policy behind the exemption and not on the simple fact that the information has changed agency hands. Thus, if the State has access to information that is exempt from public records disclosure due to confidentiality or

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<sup>15</sup> Section 119.07(1)(b), F.S.

<sup>16</sup> Section 119.07(1)(c) and (d), F.S.

<sup>17</sup> *WFTV, Inc., v. The School Board of Seminole, etc., et al*, 874 So.2d 48 (5<sup>th</sup> DCA), rev. denied 892 So.2d 1015 (Fla. 2004).

<sup>18</sup> *Ibid* at 53, *see also*, Attorney General Opinion 85-62.

<sup>19</sup> *Williams v. City of Minneola*, 575 So.2d 683, 687 (Fla. 5<sup>th</sup> DCA), review denied, 589 So.2d 289 (Fla. 1991).

<sup>20</sup> 720 So.2d 203 (Fla. 1998).

<sup>21</sup> 642 So.2d 1135, 1137 (Fla. 4<sup>th</sup> DCA 1994).

other public policy concerns, that information does not lose its exempt status simply because it was provided to the State during the course of its criminal investigation.<sup>22</sup>

It should be noted that the definition of “agency” provided in the Public Records Law includes the phrase “and any other public or private agency, person, partnership, corporation, or business entity *acting on behalf of any public agency*” (emphasis added). Agencies are often authorized, and in some instances are required, to “outsource” certain functions. Under the current case law standard, agencies are not required to have explicit statutory authority to release public records in their control to their agents. Their agents, however, are required to comply with the same public records custodial requirements with which the agency must comply.

**The Open Government Sunset Review Act** - The Open Government Sunset Review Act<sup>23</sup> provides for the systematic review of an exemption five years after its enactment. Each year, by June 1, the Division of Statutory Revision of the Joint Legislative Management Committee is required to certify to the President of the Senate and the Speaker of the House of Representatives the language and statutory citation of each exemption scheduled for repeal the following year.

The act states that an exemption may be created or expanded only if it serves an identifiable public purpose and if the exemption is no broader than necessary to meet the public purpose it serves. An identifiable public purpose is served if the exemption meets one of three specified criteria and if the Legislature finds that the purpose is sufficiently compelling to override the strong public policy of open government and cannot be accomplished without the exemption. An identifiable public purpose is served if the exemption:

- [a]llows the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption;
- [p]rotects information of a sensitive personal nature concerning individuals, the release of which would be defamatory or cause unwarranted damage to the good name or reputation of such individuals, or would jeopardize their safety; or
- [p]rotects information of a confidential nature concerning entities, including, but not limited to, a formula, pattern, device, combination of devices, or compilation of information that is used to protect or further a business advantage over those who do not know or use it, the disclosure of which would injure the affected entity in the marketplace.<sup>24</sup>

The act also requires consideration of the following:

- What specific records or meetings are affected by the exemption?
- Whom does the exemption uniquely affect, as opposed to the general public?
- What is the identifiable public purpose or goal of the exemption?

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<sup>22</sup> *Ragsdale*, 720 So.2d at 206 (quoting *City of Riviera Beach*, 642 So. 2d at 1137) (second emphasis added by *Ragsdale* court).

<sup>23</sup> Section 119.15, F.S.

<sup>24</sup> Section 119.15(4) (b), F.S.

- Can the information contained in the records or discussed in the meeting be readily obtained by alternative means? If yes, how?
- Is the record or meeting protected by another exemption?
- Are there multiple exemptions for the same type of record or meeting that it would be appropriate to merge?

While the standards in the Open Government Sunset Review Act may appear to limit the Legislature in the exemption review process, those aspects of the act that are only statutory as opposed to constitutional, do not limit the Legislature because one session of the Legislature cannot bind another.<sup>25</sup> The Legislature is only limited in its review process by constitutional requirements.

Further, s. 119.15(4) (e), F.S., makes explicit that:

... notwithstanding s. 768.28 or any other law, neither the state or its political subdivisions nor any other public body shall be made party to any suit in any court or incur any liability for the repeal or revival and reenactment of any exemption under this section. The failure of the Legislature to comply strictly with this section does not invalidate an otherwise valid reenactment.

**The Legislative Sunset Advisory Committee** – Senate Bill 2460, the passage of which this bill is contingent upon, creates the Legislative Sunset Advisory Committee (the “committee”) in statute. The committee consists of five members of the Senate, one public member appointed by the President of the Senate, and five members of the House of Representative, and one public member appointed by the Speaker of the House.

### III. Effect of Proposed Changes:

The bill creates an exemption for a working paper prepared or maintained by the Legislative Sunset Advisory Committee to conduct an evaluation and prepare a report under ch. 21, F.S. A “working paper” includes all documentary or other information, prepared or maintained by the committee in performing its duties.

The bill also provides that a record held by another entity that is considered to be confidential and exempt by law which the committee receives in connection with the performance of the committee’s functions under ch. 21, F.S., remains confidential and exempt, as well.

### IV. Constitutional Issues:

#### A. Municipality/County Mandates Restrictions:

None.

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<sup>25</sup> *Straughn v. Camp*, 293 So.2d 689, 694 (Fla. 1974).

## B. Public Records/Open Meetings Issues:

Article I, s. 24 of the State Constitution provides a constitutional right to inspect or copy “. . . any public record made or received in connection with the official business of any public body. . .” The article expressly makes the Legislature subject to open records requirements.

Under Article I, s. 24 of the State Constitution, the Legislature is expressly provided power to create exemptions to public records and meetings requirements. The power of the Legislature to create exemptions is, however, limited. An exemption must be created by general law and passed by a two-thirds vote of each house. Any law creating an exemption must “. . . state with specificity the public necessity justifying the exemption and shall be no broader than necessary to accomplish the state purpose of the law.”<sup>26</sup>

This exemption appears to be overbroad under the constitutional standard for public records. The exemption includes “[a] working paper, including *all* documentary or other information, prepared or maintained by the committee. . .” In effect, any information in the possession of the committee, even if it is public information elsewhere, is made exempt by the bill. The public necessity for the exemption is that the

“. . . release of such information would hinder the ability of the committee to conduct its evaluation and prepare its report on whether to abolish a state agency and its advisory committees because employees and other interested persons might be reluctant to provide information knowing that the information would be public and could potentially affect their employment or other dealings with the agency under review.”

Thus, the public necessity for the exemption appears to be to protect employees and regulated persons from retaliation. The exemption to which this public necessity is linked, however, protects all information held by the committee regardless of whether the information is provided by an employee or other person subject to retaliation of some sort. Under Article I, s.24 of the State Constitution, an exemption may be no broader than necessary to accomplish the stated purpose of the law. As such, the exemption appears overbroad under the constitutional standard.

The exemption also exempts “[a] record held by another entity that is *considered* to be confidential and exempt by law and that the committee receives in connection with the performance of the committee’s functions [*emphasis added*] . . .” A record is either exempt or not under the law, regardless of the holder’s consideration of whether it is exempt.

Further, information may be “confidential” in the hands of a private entity or foreign governmental entity or other state government, but unless it is made exempt by the Legislature in the hands of an agency as defined in s. 119.011(2), F.S, that “confidential”

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<sup>26</sup> *Memorial Hospital-West Volusia v. News-Journal Corporation*, 729 So.2d 373, 380 (Fla. 1999); *Halifax Hospital Medical Center v. News-Journal Corporation*, 724 So.2d 567 (Fla. 1999).

information would not be protected. On the other hand, information made confidential by Federal law could be protected.

The entity created by SB 2460 is not clearly established in a particular branch of government. If the committee created by the linked bill, SB 2460, were a purely legislative committee, s. 11.0431(2)(a), F.S., would apply. That section provides that the following information held by the Legislature is exempt:

Records, or information contained therein, held by the legislative branch of government which, if held by an agency as defined in s. 119.011, or any other unit of government would be confidential or exempt from the provisions of s. 119.07(1), or otherwise exempt from public disclosure, and records or information of the same type held by the Legislature.

As it is uncertain which branch this entity is created in, it does not appear that this provision applies.

**C. Trust Funds Restrictions:**

None.

**V. Economic Impact and Fiscal Note:**

**A. Tax/Fee Issues:**

None.

**B. Private Sector Impact:**

None.

**C. Government Sector Impact:**

None.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.



## **VIII. Summary of Amendments:**

None.

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This Senate staff analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.

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